

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1208 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

UKABHAI LALABHAI

Versus

STATE OF GUJARAT

Appearance:

MR MJ BUDDHBHATTI for Petitioner
MR.B.D.DESAI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 17/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. The appellant, who is convicted of the offence punishable under Sec. 302 of I.P.C. for murder of his father-in-law and sentenced to R.I. for life and fine of Rs.500/-, in default S.I. for two months, has approached the High Court by way of filing above numbered appeal under Sec. 374 of the Code of Criminal Procedure, 1973.

2. The complainant Jiniben Khima is resident of Village : Mahiki, Taluka : Jam Jodhpur, District : Jamnagar and was residing at the said village with her deceased husband. The complainant has a daughter named Diwali who was married to the appellant prior to 15 to 20 years of the date of the incident, which is 20th January, 1991. The appellant is resident of Village : Patan, Taluka : Jam Jodhpur, District : Jamnagar and was cultivating his land. According to the complainant, the appellant was beating Diwali as a result of which Diwali had in past left her matrimonial home on several occasions and resided with her parents, but she was returning to her matrimonial home, on persuasions of her parents. It may be stated that during subsistence of the marriage, Diwali had given birth to four boys and was pregnant at the time when the incident took place. On 12th January, 1991, Diwali returned to her parents' house as she was beaten by the appellant. On that very day, the appellant visited the house of Tapu Manji, who is the elder brother of the deceased and called his wife Diwali there and persuaded her to go with him but Diwali did not agree and therefore the appellant returned to his village Patan threatening her. The prosecution has claimed that on 20th January, 1991, at about 7 p.m. in the evening, the appellant came to the house of his in-laws on a cycle with an axe and occupied a seat in the fali. At that time, the deceased and his son were not at the house as they had gone out for some work. After the deceased and his son returned home, they took supper and though the appellant was invited to dine, the appellant refused the said offer. After taking the dinner, the deceased came out of his house whereupon the appellant asked the deceased to send Diwali with him. According to the prosecution, the deceased found that the children were asleep and therefore the deceased told the appellant that he would send Diwali with children in the morning. The case of the prosecution is that thereupon the appellant got excited and caused injury, by means of axe which he was carrying, on the head of the deceased cutting the pinna of left ear. Due to the injury, the deceased fell down and complainant and others rushed to the place of the incident, whereupon the appellant ran away leaving the axe, cycle and his shoes at the place of the

incident. The deceased was removed to Primary Health Centre, Jam Jodhpur in a tractor where he was treated by Dr.Nileshkumar Hargovindbhai. The doctor, on noticing serious injury on the deceased, referred him to Irvin Hospital, Jamnagar where he was treated by Dr.Ashiq Pathak. During the course of treatment, the deceased expired on 21st January, 1991 at about 1.00 a.m. in the morning. The complainant i.e. Jiniben Valji filed complaint with Jamnagar City 'B' Division police station on 21st January, 1991 at about 3.00 a.m. As the offence had taken place within the jurisdiction of Jam Jodhpur police station, First Information Report registered at Jamnagar 'B' Division police station was transferred to Jam Jodhpur police station for necessary investigation. The autopsy on the dead body of the deceased was performed by Dr.Harimohan Mangal Srilal Mangal at Jamnagar Irvin Hospital. Further investigation into the case was made by Bipinchandra Patel who was then P.S.I. of Jam Jodhpur police station. During the course of investigation, the appellant was arrested on 21st January, 1991 at about 20.30 hrs. At the conclusion of the investigation, the appellant was chargesheeted of the offence punishable under Sec. 302 of I.P.C. As the offence punishable under Sec. 302 of I.P.C. is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Jamnagar for trial where it was numbered as Sessions Case no. 57 of 1991. The charge under Sec. 302 of I.P.C. was framed by the Learned Addl.Sessions Judge, Jamnagar against the appellant. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. Therefore, in all 13 witnesses were examined by the prosecution to prove its case against the appellant. They were :

Sr. Name of Witness P.W.No. Exh.
No.

1. Dr.Bhavin P Trivedi 1 11
2. Dr.Harimohan Mangal
Srilal Mangal 2 15
3. Dr.Nileshkumar
Hargovindbhai 3 29
4. Dr.Ashiq L Pathak 4 35
5. Jiniben Khima 5 39
6. Karamsinh Valji 6 40
7. Diwaliben Veljibhai 7 41
8. Mohan Aba 8 42
9. Jambha Gagubha 9 47
10. Rupchand Narsingbhai 10 53
11. Dharamsinh R Rathod 11 60
12. Gulab V Borse 12 63

The documentary evidence such as post-mortem notes prepared by Dr.Harimohan Mangal, complaint filed by Jiniben, Inquest report, report of serologist etc. was also produced by the prosecution to prove its case against the appellant. After recording of evidence of prosecution witnesses was over, the Learned Judge recorded the statement of the appellant under Sec. 313 of the Cr.P.C. In his further statement, the appellant claimed that the case of the prosecution against him was false but he did not examine any witnesses in support of his defence.

3. On appreciation of evidence adduced by the prosecution, the Learned Judge held that it was proved by the prosecution that the deceased died a homicidal death. The Learned Judge believed the testimony of Jiniben Khima, Karamsinh Valji as well as that of Diwaliben Veljibhai and held that it was proved by the prosecution beyond reasonable doubt that the appellant had delivered a blow with an axe on the head of the deceased. The Learned Judge noticed that according to Dr.Harimohan Mangal, the injury caused on the deceased was sufficient in the ordinary course of nature to cause his death and therefore concluded that the offence of murder punishable under sec. 302 of I.P.C. was committed by the appellant. In view of the above referred to conclusions, the Learned Judge has convicted the appellant under Sec. 302 of I.P.C. and sentenced him to R.I. for life and fine of Rs. 500/-, in default S.I. for two months by judgment dated 30th November, 1992, giving rise to the present appeal.

4. Mr.M.J.Buddhbhatti, Learned Counsel for the appellant, after taking us through the entire evidence on record submitted that neither the evidence of Jiniben Khima nor the evidence of Karamsinh Valji nor the testimony of Diwaliben Veljibhai indicates that they were present when the alleged assault on the deceased was made and therefore the appellant should not have been convicted of the offence punishable under Sec. 302 of I.P.C. The Learned Counsel pointed out the exaggerations as well as contradictions appearing in the evidence of witnesses and pleaded that the evidence of prosecution witnesses against the appellant was not reliable at all. What was claimed was that except the evidence of related and interested witnesses, prosecution could not examine any independent witness to bring home guilt to the appellant and therefore the conviction of the appellant for murder of his father-in-law should be set aside. In

the alternative, the Learned Counsel urged that the appellant had visited the house of his in-laws' for the purpose of bringing his wife back to the matrimonial home and as there was no pre-meditation nor any intention to kill the deceased, it should be held that the appellant had committed an offence punishable under Sec. 304 Part-I of I.P.C. more particularly, when only one blow was given after altercation with the deceased. The Learned Counsel, on instruction of the appellant, stated that 3 children are residing with the mother of the appellant whereas Diwaliben has already remarried and as the blow was given because of grave and sudden provocation from the deceased, the conviction of the appellant should be altered to one punishable under Sec. 304 Part-I of I.P.C. and the appellant having undergone sentence of 11 years with remissions, should be imposed sentence already undergone.

5. Mr.B.D.Desai, Learned A.P.P. for the State submitted that the evidence of Jiniben Khima as well as that of Karamsinh Valji and Diwaliben is trustworthy as well as reliable and therefore the Learned Judge did not commit any error in placing reliance on their testimony for the purpose of convicting the appellant under Sec. 302 of I.P.C. The Learned Counsel for the State stressed that Jiniben and other witnesses who are closely related not only to the deceased but also to the appellant, would not allow the real culprit to go scot free and involve the appellant falsely in a serious case and therefore their testimony should be accepted by the court for upholding the conviction of the appellant under Sec. 302 of I.P.C. The Learned Counsel for the State pointed out that the appellant had come with an axe and on refusal by the deceased to send Diwaliben with him, had caused injury with a lethal weapon like axe on vital part of the body and as the injury was sufficient in the ordinary course of nature to cause death of the deceased, the appellant is rightly convicted under Sec. 302 of I.P.C. and his conviction should not be altered to that punishable under Sec. 304 Part-I of I.P.C.

6. We have heard the Learned Counsels for the parties and taken into consideration the evidence on record. The finding recorded by the Learned Judge that the deceased died a homicidal death is not disputed and therefore the same is hereby upheld. The fact that Diwaliben had come to her parents' house because of the physical ill-treatment meted out to her by the appellant is not in dispute and is proved by the evidence of Diwaliben. Diwaliben had to come to her parents' house on 12th January, 1991 because she was beaten by the

appellant. On that very day, the appellant had gone to the house of Tapu Manji who is the elder brother of the deceased and called Diwali at the house of Tapu Manji. Though the appellant had offered Diwaliben to take her with him, Diwaliben had refused to go with the appellant and therefore the appellant had to return to his village Patan. The evidence of Jiniben Khima, p.w.no. 5 exh. 39 shows that on 20th January, 1991 at about 7 p.m., the appellant had come to her house on a cycle with an axe and had occupied a seat in fali. According to the testimony of the witness, the deceased and her son were not in the house and therefore the appellant had waited for them. As stated by this witness, on return of the deceased and his son Karamsinh, they had taken meals and the appellant had refused to join his father-in-law when he was offered meals by witness Jiniben. The evidence of Jiniben makes it evident that the appellant had demanded that Diwaliben should be sent with him immediately but the deceased had said no as it was late in the night and children were asleep. What is claimed by Jiniben is that thereupon the appellant had got excited and delivered a blow with an axe on head of the deceased as result of which the deceased had sustained serious injuries. According to this witness, immediately she and other members of the family had rushed to the place where the deceased was assaulted and the appellant had run away leaving the axe, cycle and his shoes. The witness has narrated in detail as to how the deceased was removed to Primary Health Centre, Jam Jodhpur, Irvin Hospital, Jamnagar etc. Though this witness was searchingly cross-examined at length, nothing could be brought on record to doubt her version about the incident as stated by her in her examination-in-chief. The presence of this witness at the house is quite natural. Though some contradictions with reference to her earlier police statement are brought on record, we are of the opinion that those contradictions are not material at all and do not affect the evidentiary value of the testimony of this witness. Similarly, Karamsinh Valji who is son of the deceased and Diwaliben Valji who is daughter of the deceased and wife of the appellant, have also stated in their testimonies before the court that the appellant had assaulted the deceased by means of an axe and caused injury on the head of the deceased. These witnesses are also cross-examined at length but nothing could be elicited so as to destroy their version about the incident as stated by them in their examination-in-chief. It is relevant to notice that the deceased as well as the appellant are related to the three witnesses who claim to be eye witnesses. The defence has not been able to bring on record any enmity as such between Jiniben Khima or for

that purpose Karamsinh Valji or Diwaliben Valji on one hand and the appellant on the other. As witnesses examined are closely related to the appellant as well deceased, they would not allow the real culprit to go scot free and involve the appellant falsely in a serious case. On overall view of the matter, we are satisfied that the Learned Judge did not commit any error in placing reliance on sworn testimonies of the witnesses for the purpose of coming to the conclusion that the appellant had caused injury on the head of the deceased by means of an axe and caused his death.

7. Coming to the question of nature of offence committed by the appellant, we find that the learned Judge has relied upon the evidence of Dr.Harimohan Mangal Srilal Mangal for the purpose of coming to the conclusion that the appellant has committed offence punishable under Sec.302 of I.P.C. because according to the said doctor, the injury sustained by the deceased was sufficient, in the ordinary course of nature, to cause his death. Whenever the court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder, on the facts of the case, it will be convenient for it to approach the problem in 3 stages. The question to be considered at the first stage would be whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in Sec. 299. If the answer to this question is prima facie found in the affirmative, the 3rd stage for considering the operation of Sec. 300 of I.P.C. is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within ambit of any of the four clauses of the definition of murder contained in Sec. 300. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder punishable under the first or the second part of Sec. 304 depending respectively on whether the second or the third clause of Sec. 299 is applicable. If the court finds that the case comes within the ambit of any of the 4 clauses of the definition of murder contained in Sec. 300, the further inquiry to be made should be to find out whether the case comes within any of the exceptions enumerated in Sec. 300 and if this question is found in the positive, the offence would be still culpable homicide not amounting to murder punishable under the First part of Sec. 304. If the court finds that the facts proved by the prosecution bring the case within the

ambit of any of the 4 clauses of the definition of murder contained in Sec. 300 and the case does not fall within any of the exceptions enumerated in Sec. 300, the offence would be murder and not culpable homicide not amounting to murder.

8. Applying the above principles to the facts of the present case, we find that witness Gulab V Borse, p.w.no. 12 exh. 63 has clearly stated in his evidence that on 20th January, 1991, he was on duty as Head Constable at Irvin Hospital, Jamnagar and on January 21, 1991, at about 12.30 hrs. in the night, Valji Manji of village Mahiki was brought to Jamnagar Irvin Hospital for treatment as he had sustained injury in a fight. According to this witness, on necessary information being conveyed to him by Jiniben, he had made entry in Medico Legal Case Register maintained at the hospital. He produced the entry in the register at exh. 64. A bare reading of exh. 64 makes it evident that Jiniben had informed the witness Gulab Borse that when the deceased was at his house, her son-in-law residing at village Patan had come to take Devi Valji with him, whereupon an altercation had taken place between the son-in-law and father-in-law and because of provocation, the son-in-law had caused serious injury on the head of the deceased by means of an axe. From the evidence of witness Gulab Borse, there is no manner of doubt that the information about the incident was conveyed to him by Jiniben who was the witness to the incident and the information was conveyed at the earliest possible time. In the said information, the nature of the injury sustained by the deceased person, the name of person who had caused the injury, the weapon of offence etc. were also stated. In our view, therefore, the entry made by the witness Gulab Borse in Medico Legal Case Register ought to have been treated as First Information Report in the case and the Learned Judge was not justified in treating the information conveyed by witness Jiniben at 3 a.m. to Jamnagar 'B' Division police station as the information conveyed by Jiniben because that is in the nature of a statement recorded under Section 161 of Code of Criminal Procedure. The information recorded in Medico Legal Case Register makes it manifest that an altercation had taken place between the deceased and the appellant regarding sending of Diwaliben with the appellant. As is evident from the testimony of witness Jiniben, witness Diwaliben and witness Karamsinh, the appellant had earlier made an attempt on 12th January, 1991 to bring Diwaliben with him at her matrimonial home but failed. When he had gone to the house of his in-laws on the date of incident, the intention of the appellant was to bring his wife back to

his home and therefore he had waited for a pretty long time as the deceased was not at home. Though it is proved by the evidence of prosecution witnesses that the appellant had done an act by doing which he had caused death of the deceased, the court will have to find out whether the act of the appellant comes within the ambit of any of the four clauses of definition of murder contained in Sec. 300 and also whether it falls within the ambit of any of the exceptions enumerated in Sec. 300. It is true that Dr. Harimohan Mangal has maintained before the court that the injury sustained by the deceased was sufficient, in the ordinary course of nature, to cause death of the deceased but as observed earlier, it is the prosecution case itself that before the blow was delivered by the appellant on the deceased, an altercation between him and the deceased had taken place regarding sending of Diwaliben with the appellant and therefore it would be relevant to find out whether the case is governed by exception no. 1 enumerated in Sec. 300 of I.P.C. In order to bring the case within this exception, it is necessary that following facts should be established :

- (1) The offender must have done the act whilst deprived of the power of self control.
- (2) He must have been so deprived by reason of provocation.
- (3) The provocation must be grave and sudden.
- (4) The provocation must not have been sought by the offender.

9. The facts of the case would indicate that the intention of the appellant was to bring back his wife with children to his house and the fact that before the blow was delivered, an altercation had taken place between him and his father-in-law would show that the appellant had done the act whilst he was deprived of the power of self control and he was so deprived by reason of provocation. If the deceased had agreed to send Diwaliben with the appellant during night hours and had not asked the appellant to wait till morning, there was no reason for the appellant to deliver fatal blow to the deceased. The record does not indicate that the intention of the appellant was to kill his father-in-law and if that had been so, he would not have waited for him till the deceased and his son had finished the dinner. After completion of dinner, the appellant had tried to plead with the deceased to send his wife with him, but without any success. Under the circumstances, we are of the firm opinion that the case would be governed by Part I of Sec. 304 of I.P.C., more particularly when only one

blow was given and when the prosecution evidence does not show that the appellant had acted cruelly or taken any undue advantage of the situation. We notice that the Learned Judge, after taking into consideration the medical evidence on record indicating that the injury sustained by the deceased was sufficient to cause his death in ordinary course of nature, did not make further inquiry as to whether the case was governed by any of the exceptions enumerated in Sec. 300 of I.P.C. The approach made by learned Judge being erroneous in law is liable to be set aside. Having regard to the facts and circumstances of the case as well as the manner in which the incident has taken place, we are of the opinion that the case comes within the first exception enumerated in Sec. 300 and the appellant is guilty of offence punishable under Part I of Sec. 304 of I.P.C. and not under Sec. 302 of I.P.C.,

10. For the foregoing reasons, the appeal is partly allowed. The conviction of the appellant under sec. 302 I.P.C. is altered to that under Section 304-Part I I.P.C. We have heard the appellant, who is personally present in the court, regarding sentence to be imposed. We have also heard the Learned Counsel for the State Government on the question of sentence. We may state that the appellant has been granted temporary bail and that is how he has remained present in the Court. The record of the case indicates that the appellant was arrested on 21st January, 1991 and was not granted bail during the pendency of trial. After conviction, his appeal was ordered to be admitted by the order dated 1st September, 1993 but bail was refused to him. Thus, it is evident that the appellant has undergone sentence of R.I. for 10 years and with remission, the sentence undergone may be more than 11 years. Normally, sentence of R.I. for 10 years should be sufficient when a person is convicted under Part I of Sec. 304, I.P.C. and therefore having regard to the facts of the case, the appellant is sentenced to imprisonment which he has already undergone. As the appellant has undergone sentence imposed by this court, the respondent is directed to set him at liberty immediately unless his presence is required with reference to any other case. Muddammal articles are ordered to be disposed of in terms of directions given by the Learned Judge in the impugned judgment.

11. Before parting with the judgment, we may mention that Mr. M.J. Buddhbhatti, the Learned Counsel who was appointed as Amicus curiae has rendered excellent assistance not only to the appellant but also to the

court by highlighting certain aspects of the case and we place on record our appreciation for sincere efforts put in by Shri Buddhbhatti for rendering useful assistance to the Court.

(J.M.PANCHAL, J.)

(SHARAD D DAVE, J.)

/srilatha/

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE
Date of decision: 17/04/2001

For the reasons recorded in the detailed judgment, the appeal is partly allowed. The conviction of the appellant under sec. 302 I.P.C. is altered to that under Section 304-Part I I.P.C. The Hon'ble Court has held that the record of the case indicates that the appellant was arrested on 21st January, 1991 and was not granted bail during the pendency of trial. After conviction, his appeal was ordered to be admitted by the order dated 1st September, 1993 and bail was refused to him. It is further held by the Hon'ble Court that it is evident that the appellant has undergone sentence of R.I. for 10 years and with remission, the sentence undergone may be more than 11 years. Normally, sentence of R.I. for 10 years should be sufficient when a person is convicted under Part I of Sec. 304, I.P.C. and therefore having regard to the facts of the case, the appellant is sentenced to imprisonment which he has already undergone. As the appellant has undergone sentence imposed by this court, the respondent is directed to set him at liberty immediately unless his presence is required with reference to any other case. Muddammal articles are ordered to be disposed of in terms of directions given by the Learned Judge in the impugned judgment.